IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 226

POLISH NATIONAL ALLIANCE OF THE UNITED STATES OF NORTH AMERICA, A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Polish National Alliance of the United States of North America, respectfully prays for the writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, to review a judgment of that Court entered on the 5th day of June, 1943, in Case No. 8090, *Polish National Alliance of the United States of North America, a corporation, petitioner*, v. *National Labor Relations Board respondent*, upon Petition for Review and to Set Aside an Order of the National Labor Relations Board, and upon the petition of the National Labor Relations Board for enforcement of its order; which judgment enforced the Board's order with certain modifications. Enforcement Decree was entered in conformity therewith June 22nd 1943.

Summary and Short Statement of the Matter Involved

A complaint was issued March 9, 1942, by the National Labor Relations Board against Polish National Alliance of the United States of North America, a fraternal benefit society incorporated under the laws of Illinois, with its principal office in Chicago (App. 307). An order of the Board was entered August 11, 1942 (App. 539) after hearing before an Examiner for the Board, and exceptions to his Intermediate Report had been filed by the Alliance, and oral argument had before the Board. The Order found that the petitioner here (respondent there) was engaged in interstate commerce within the meaning of the National Labor Relations Act, and that Office Employees' Union No. 20732, A.F. of L. had a majority of an appropriate unit on March 26, 1941, when, as found by the order, petitioner refused to bargain collectively with the Union; that petitioner had interfered with its employees' rights under Section 7; that one, Anna Owsiak had been discriminatorily discharged; that employees of petitioner had gone on strike because of petitioner's activities which, the Order found, also resulted in a prolongation of the strike; that one, Ziolkowski was discriminated against; that the striking employees had been refused reinstatement upon their application therefor, January 27, 1942; that petitioner discouraged membership in the Union, and that the activities of petitioner in this regard had a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tended to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

The Order required petitioner to bargain collectively with the Union; to reinstate the striking employees, and one Henry Ziolkowski and make them whole for any loss of pay suffered since January 27, 1942; and to reinstate

Anna Owsiak with back pay from October 6, 1941, the date of her alleged wrongful discharge (App. 572-4).

The Order further required petitioner to cease and desist from refusing to bargain collectively with the Union as the exclusive representative of the office employees of the Chicago office of petitioner (excluding certain designated classes of employees) and from discouraging membership in the Union; and from coercing its employees (App. 572-4).

Petitioner was required to dismiss, if necessary, all employees hired since October 7, 1941, the date of the beginning of the strike, and to place those strikers for whom employment was not immediately available upon a preferential list, and offer them employment as it becomes available (App. 572-4); and to post notices of compliance.

The Decree enforces the Order in all respects, with the exception that it requires petitioner to make Henry Ziolkowski whole for any loss of pay suffered since October 10, 1941, when he requested reinstatement, instead of from January 27, 1942, when the other strikers applied for reinstatement. The Decree also modified the Order by eliminating therefrom the words "successors and assigns" of petitioner; and required the notices to state that the employees of petitioner were free to become or remain members of the designated Union "or any other organization of their own choosing" and would not be discriminated against therefor (App. 621-624).

Jurisdictional Basis.

1. The judgment of the Circuit Court of Appeals allowing the request of the National Labor Relations Board for enforcement of its Order, was entered on June 5, 1943, upon petition by petitioner for review of the Order and petition of National Labor Relations Board for its enforcement. The Petition for Review was filed under Sec.

160(f) Title 29 U. S. Code (1940 Ed.). Decree of enforcement was entered on June 22, 1943.

2. Petitioner is a fraternal benefit society, organized as a not for profit corporation under the laws of the State of Illinois, with its head office in Chicago, Illinois.

3. Jurisdiction is invoked under Sec. 347 A, Title 28, U. S. Code (1940 Ed.).

Questions presented.

1. Is an Illinois fraternal benefit society, operating in the several States from its head office in Chicago, Illinois engaged in commerce within the meaning of the commerce clause of the Constitution of the United States?

2. Is a fraternal benefit society incorporated under the Laws of the State of Illinois an insurance company, and its operations in issuing benefit certificates the business of insurance?

3. Is insurance "commerce" within the meaning of the commerce clause of the Constitution of the United States?

4. Does the use of the mails and other means of interstate communication and transportation incidentally to the issuance of benefit certificates and the investment activities of a fraternal benefit society bring the society within the provisions of the National Labor Relations Act as thereby "affecting commerce", so that a labor dispute with its employees may be considered as "burdening and obstructing commerce and the free flow of commerce"?

5, Does the incidental use of the mails and of interstate means of communication and transportation by any organization whose primary activity is not commerce within the meaning of the Commerce Clause of the Constitution of the United States, bring such organization within the provisions of the National Labor Relations Act, as

thereby "affecting commerce" and a labor dispute with its employees as "burdening and obstructing commerce and the free flow of commerce"?

6. Did Office Employees Union No. 20732 A. F. of L. have, as a matter of law, from the record in this case, a majority of an appropriate unit of petitioner's office employees at Chicago, Illinois, on March 26, 1941, who had selected it as their representative for collective bargaining?

7. Are the findings of the decree as to alleged coercion by petitioner of its employees; and as to the cause of the strike and its prolongation; and as to the alleged refusal to reinstate the employees Anna Owsiak and Henry Ziolkowski and the strikers named in Appendix "A"; and the enforcement provisions of the decree, based upon substantial evidence and in accordance with the law?

Reasons Relied On for the Granting of the Writ of Certiorari.

1. The Circuit Court of Appeals in this case decided an important question of Constitutional Law, contrary to a long line of decisions in this Court, when it held that insurance is commerce within the meaning of the Commerce Clause of the Constitution of the United States.

2. The Circuit Court of Appeals decided an important question of Constitutional Law contrary to the decisions of this Court, when it held that use of the mails and of interstate means of communication and transportation, of themselves, bring the user within the meaning of the Commerce Clause of the United States, as being engaged in commerce, or affecting commerce.

3. The Circuit Court of Appeals decided an important question of general and local law, contrary to the law as laid down by this Court, and by the courts of Illinois when it held that a fraternal benefit society, organized under

the laws of Illinois as a not for profit organization, is, in issuing benefit certificates, engaged in the business of insurance.

4. The Circuit Court of Appeals decided an important question of Constitutional Law contrary to the decisions of this Court, when it held that a fraternal benefit society, organized and operating under the laws of a State, by its use of the mails and other means of interstate communication in its issuance of benefit certificates to persons in the various states, and in its investments in securities issued in other states, is, by such activities "affecting commerce" within the meaning of the National Labor Relations Act, and that a labor dispute with its employees "burdens and obstructs commerce and the free flow of commerce."

5. The enforcement decree of the Circuit Court of Appeals is not based upon substantial evidence in important particulars, and is not in accordance with the law.

Wherefore Your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, sitting at Chicago, Illinois, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

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Polish National Alliance of the United States of North America.

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NATIONAL LABOR RELATIONS BOARD,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

For opinion, see Appendix to Brief, pp. 605-617.

Jurisdiction.

The jurisdictional basis is set out in the Petition, to which reference is made.

STATEMENT OF THE CASE.

The Pleadings.

A complaint was issued March 9, 1942, by the National Labor Relations Board (amended March 12, 1942) (App.

307, 316) against petitioner, Polish National Alliance of the United States of North America, charging that petitioner is a fraternal benefit society, incorporated under the laws of the State of Illinois, with its main office in Chicago; and stating that it was engaged in the operation of a death, disability and accident insurance business, the publication of a weekly and a daily newspaper and in the investment of funds in real estate and securities.

The complaint alleged that petitioner was licensed to conduct an insurance business in twenty-six states of the United States, in the District of Columbia and in Manitoba, Canada. That it writes insurance, collects premiums and pays out benefits in all the states and territories in which it is licensed. That it had investments throughout the United States in stocks, bonds and mortgages and real estate.

It stated that Office Employees' Union No. 20732 A.F. of L. is a labor organization within the meaning of Section 2 (5) of the Act.

The complaint set out what it alleged to be an appropriate bargaining unit, including several classes of office employees and excluding others; and stated that on or about March 26, 1941, a majority of such unit selected the Union as their representative for collective bargaining, but petitioner refused to bargain collectively with the Union, thereby violating Sec. 8(5) of the Act relating to unfair labor practices (App. 308).

It was charged that one Anna Owsiak had been discharged for Union activities. That a strike began October 7, 1941 and continued until January 7, 1942,—provoked and prolonged by petitioner. That one Henry Ziolkowski on or abuot October 10, 1941, who had gone out on strike, asked reinstatement and was refused it. That twenty-six strikers also asked reinstatement and were refused.

The acts charged were alleged to have a close relation to interstate commerce and to tend to cause labor disputes "burdening and obstructing commerce and the free flow of commerce."

The answer filed by petitioner (App. 320) admitted that it was a fraternal benefit society incorporated under the laws of the State of Illinois, with its main office in Chicago. Petitioner denied that it was engaged in the operation of a death, disability and accident insurance business and in the publication of a weekly and a daily newspaper. It admitted its investment of funds and that it is licensed to do business in twenty-six states, the District of Columbia and Manitoba, Canada.

Petitioner denied that it wrote insurance, collected premiums and paid out benefits other than as a fraternal benefit society organized under the laws of the State of Illinois. It denied that it conducted an "insurance business" or published a newspaper other than the weekly official organ of the society, to circulate among the members whose subscription was included in their membership fee. It stated that the daily newspaper referred to, was published by a separate corporation whose capital stock was owned by the directors of petitioner *ex officio* (App. 321).

The answer denied that petitioner was engaged in interstate commerce within the National Labor Relations Act (App. 322). It stated that petitioner is a non profit organization with purposes set out in the Preamble to its Constitution, which were to form "a more perfect union of the Polish people in this country; insuring to them a proper moral, intellectual, economic and social development; preserving the mother tongue as well as the national culture and customs; and promoting more effectually all movements tending to secure by all legitimate means the restoration and preservation of the independence of

the Polish territories in Europe." Its stated objects, in addition, were to "promote fraternalism among its members, and provide death, disability, accident and other benefits to its members and their beneficiaries."

The answer denied that an appropriate bargaining unit was set out in the complaint as amended and alleged that certain persons and classes sought to be excluded should be included in the unit (App. 322). It denied that the Union had a majority in an appropriate unit. It admitted its refusal to bargain, saying that it was not engaged in interstate commerce and therefore not within the Act.

The unfair labor practices were denied, also the discriminatory discharge of Anna Owsiak, the alleged coercion and interference, and the refusal to reinstate Henry Ziolkowski and the other strikers. It denied that its conduct led to labor disputes which burdened or obstructed commerce and the free flow of commerce (App. 325).

The hearing before a Trial Examiner resulted in an intermediate report recommending an order as prayed in the complaint as amended, which, upon exceptions and oral argument, was sustained in great part, and a Board order issued accordingly (App. 495, 530).

A petition for review was filed immediately upon the issuance of the Board's order (App. 578), and the Board countered with a request for enforcement of its order (App. 586). The Board's request was granted, subject to minor modifications, and a decree entered, June 22nd, 1943, (App. 621) which is temporarily stayed pending the application for certiorari (App. 620).

The Evidence and the Board's Findings.

The charter of petitioner (App. 456) shows that it is an Illinois corporation, organized as a fraternal benefit society without capital stock, for the sole benefit of its

members and their beneficiaries, and not for profit, having a lodge system with ritualistic form of work and a representative form of government. The Preamble to its Constitution states (App. 326):

> "When the Polish Nation, notwithstanding heroic sacrifices and sanguinary struggles, lost its independence, and by decree of Providence became doomed to triple bondage and was divested of its rights to life and development by force of the invaders, that portion thereof, most severely wronged, voluntarily, preferring exile to cruel bondage in the Motherland, sought refuge under the guidance of Kosciuszko and Pulaski, in the free land of Washington, and settling here, found Hospitality and Equal Rights.
>
> These valiant pilgrims, ever mindful of their duties to their newly adopted country and their own nation, founded the Polish National Alliance of the United States of North America for the purpose of forming a more perfect union of the Polish people in this country; insuring to them a proper moral, intellectual, economic and social development; preserving the mother tongue as well as the national culture and customs; and promoting more effectually all movements tending to secure, by all legitimate means, the restoration and preservation of the independence of the Polish territories in Europe."

Petitioner is organized into 1817 lodges, which meet at least once a month. Its supreme legislative and governing body is the Convention which meets at least once in four years. Delegates to the Convention are selected from groups of lodges, each group forming what is known as a Council, of which there are approximately 190 (App. 443).

The elective officers are the Censor, Vice-censor, and Commissioners, who together form the judicial, appellate

and supervisory body in the Alliance known as the Supervisory Council. There are also elected a President, two Vice-Presidents, General Secretary, Treasurer and Board of Directors. The Board of Directors is the executive and managing body of the Alliance.

On December 31, 1941, petitioner had in force 272,897 benefit certificates of the value of $159,683,583. It owned assets of $30,090,835 in cash and bonds issued by the U.S. and by the several States and political subdivisions thereof, and by Canada and Poland; also stocks, mortgages and real estate in several States. Its income during 1941 was $5,717,344 of which $3,732,364 was received from members, and $1,690,250 from investments. In 1941 benefits paid amounted to $1,845,126 (App. 444).

The operations of the Alliance, beneficiary and fraternal, are centered in the Home Office in Chicago, Illinois.

The Directors of the Alliance are *ex officio* stockholders of Alliance Printers and Publishers Inc. an Illinois corporation with its principal office in Chicago, which publishes the weekly organ of the Alliance, the subscription to which is included in the membership dues; and a daily paper which is put on sale in Illinois, Indiana and Michigan (App. 445).

Petitioner has spent $7,109,786.87 since its organization for charitable, educational and fraternal activities among its members (App. 481) and in the year 1941 spent for such purposes the sum of $252,210.03 (App. 481). Some of the principal items of this expenditure are: Educational $3,620,862.90; National purposes $2,388,959.52; Relief $698,042.94; Commissions and Departments $316,568.02 (Immigration Commission, Help to Immigrants, etc); Civil manifestations and memorials $83,353.49 (App. 481, 482).

Office Employees Union No. 20732 is a labor organization affiliated with the American Federation of Labor. It

admits to membership office employees of petitioner's Chicago office.

There were 138 employees in the Chicago office (App. 410). Of these, 111 were declared by the Board to be an appropriate bargaining unit (App. 548). The Board included in the unit five chief clerks in charge of departments, over the objection of petitioner that they were supervisory employees. They had all chosen the Union as their representative. The Board excluded the Chief Organizer, the Manager of the Real Estate Department and the Inspector of Rent Collections, none of whom was a Union member. The Board included the secretary to the Chief Medical Examiner who had signed a union card and excluded the secretary to the President, who had not. The Board included the two editors who had signed union applications and excluded two librarians who had not. The eleven rent collectors, who reported each day at the office and had quarters assigned to them there, were excluded. They were not union members (App. 546, 7, 8; 215-223).

The Board found that sixty employees within the appropriate unit of one hundred and eleven had chosen the Union as their bargaining representative. As to one of these, petitioner contended that it had shown an immediate revocation by the signer, but its contention was overruled (App. 279, 548).

Petitioner refused recognition to the Union, stating that it was not subject to the jurisdiction of the National Labor Relations Board (App. 200). When the request was renewed on September 26, 1941, it was denied, but time was asked by petitioner to present the matter to the Supervisory Council which would meet in the following December (App. 64).

Statements of various persons derogatory to the Union are in evidence which petitioner claimed were not au-

thorized by it or made by those in a position to bind it by their statements. The Board found them to be coercive (App. 563).

Anna Owsiak, a union member, whose time card showed that from December 10, 1940 to September 9, 1941, she was absent 48 hours on six separate days, tardy 21 times and absent for a total of 14 hours on six occasions (App. 487), on September 11th, 1941 underwent an operation and returned on October 6th, ready to go to work. She testified that the General Secretary of petitioner told her that because of lack of work it was determined to let her go; that she might be called back in a month or two but should look for another job and take it if she found it. The Secretary testified that he told her to wait for a few days, maybe a few weeks, but that her position would remain open for her.

As Anna Owsiak left the building of the Alliance she met two union officials who told her to wait in their automobile outside. They went into the building and among other things discussed with officials of the Alliance the case of Anna Owsiak. They threatened a strike unless she was put to work; and one, Helen Lahajczyk transferred back to her former position. The President told the Secretary to put Anna Owsiak to work at once, but refused to retransfer Helen Lahajczyk. One of the union officials demanded that Anna Owsiak, who, unknown to the officers of the Alliance was then outside the building, be telephoned to come back to her job before seven that evening. He did not say that she could be called in from the waiting automobile (App. 71). She was not telephoned. The next day a strike was called.

The Board found that Anna Owsiak was discharged for union activities; but found no discrimination in the transfer of Helen Lahajczyk.

The union officials claimed that the Owsiak and Lahajczyk incidents caused the strike (App. 65, 72).

The strike continued from October 7, 1941 until January 27, 1942, when the strikers, 26 in all, requested reinstatement (App. 423).

Petitioner in certain communications from the Head Office to the lodges and councils charged that certain of the strikers were seeking revenge on the present officers because of their defeat at the last Convention when the "leader of the dissatisfied employees was one of the candidates" for office of Secretary General. In one of the issues of the weekly organ of the Alliance it was stated over the signatures of certain officers that the Directors could not permit persons who had nothing in common with the Polish National Alliance and Polish traditions to decide who was qualified for work in the offices of the Alliance; and that a labor union was not necessary in a fraternal benefit society, organized for the mutual benefit of all; and that, in any event, the question was one properly to be passed upon by the Convention as the "Supreme Governing body of our Society" (App. 421). The article declared that in the opinion of the signers the Alliance was not subject to the provisions of the National Labor Relations Act.

The Board found that "as a result of the respondent's (petitioner here) refusal to bargain; its discriminatory discharge of Anna Owsiak; and its other and numerous acts of interference, restraint and coercion, the employees of the respondent went on strike," and that the strike was prolonged by petitioner's "unlawful activities" (App. 564).

The chief clerk in the Mortuary Department, Henry Ziolkowski, employed since 1919, went out on strike, but on the next day asked permission to return to work, which

was granted. He reported on October 10, the fourth day of the strike and was told to sign an application for work. This he refused to do, "because I did not feel like a newcomer". He did not resume his employment. The Board found that the requirement as to signing an application was an "unfavorable condition" attached to the offer of reinstatement "in order to punish Ziolkowski for having joined the Union and the strike."

On January 27, 1942, the strikers through their attorney requested reinstatement. No reply was made to the attorney's letters. Petitioner stated on the hearing that there did not exist sufficient vacancies to accomodate all the strikers, since the reorganization of positions and the transfer of employees from the real estate department, where business was greatly diminished, to positions formerly held by strikers, and because of the consolidation and abolition of certain positions A reorganization table was put in evidence (App. 242, 249, 290, 484, 566). It appeared that there had been a net new employment of six persons since the strike. The Board found a wrongful refusal to reinstate the strikers and ordered their reinstatement, with back pay.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that petitioner, a not for profit fraternal benefit society organized under the laws of Illinois, is engaged in the busjness of insurance.
2. In holding that insurance is commerce within the meaning of the National Labor Relations Act.
3. In holding that the fraternal benefit operations of petitioner affected commerce within the meaning of the National Labor Relations Act, and that a labor dispute between petitioner and its employees

burdened and obstructed commerce and the free flow of commerce.

4. In holding that use of the mails and of the means of interstate communication and transportation brought petitioner within the purview of the National Labor Relations Act, as having affected commerce by such use, whether petitioner has otherwise engaged in commerce or not.

5. In finding that the Union had a majority of an appropriate bargaining unit of petitioner's employees.

6. In entering the enforcement decree herein, and each provision thereof.

7. In refusing to dismiss the complaint as amended.

Summary of Argument.

I.

Petitioner is a fraternal benefit society, organized under the laws of the State of Illinois as a not for profit corporation, having a representative form of government and a lodge system with ritualistic form of work. The issuance of benefit certificates to its members is not engaging in the insurance business, as found by the Court of Appeals. Petitioner is not in commerce, nor do its activities affect commerce, or a dispute with its employees burden commerce, or the free flow of commerce, so as to bring it within the National Labor Relations Act.

The holding of the Circuit Court of Appeals that a fraternal benefit society is engaged in the business of insurance is counter to the law in Illinois and other States. These societies in Illinois are organized and operate under a special Article of the Insurance Code, and are there declared to be charitable and benevolent institutions.

The aims of a fraternal benefit society are religious, cultural and fraternal. They are not permitted to make a profit on their benefit certificates, which are considered incidental to the main purposes of their creation. Without the profit motive there is no commerce in the Constitutional sense. This is recognized by this Court in the *Associated Press* case 301 U.S. 123, 5, where it is stated that although the Press Association was a non-profit organization its members were all "engaged in a commercial business for profit."

II.

Insurance is not commerce. The Court of Appeals in holding that petitioner was engaged in the insurance business, and was therefore engaged in commerce, or, in any event, its activities affected commerce, refused to follow the long line of decisions in this Court beginning with *Paul* v. *Virginia*, 8 Wall. 168, that insurance is not commerce. The distinction made by the Court below that these decisions are limited to cases involving State taxation and State regulation, and not to Congressional power to regulate, is not, in view of the language of these decisions, a valid distinction. The cases hold that a policy of insurance is not a commodity and therefore is not the subject of interstate commerce.

III.

That which in its consummation is not commerce, does not become commerce between the States because incidental transportation or the use of the mails takes place in connection therewith.

The Court of Appeals, in holding, in effect, that mere use of the mails or other means of interstate communication incidentally to the issuance of fraternal benefit certificates, was alone and of itself sufficient to bring any or-

ganization, whether conducted for profit or not, within federal regulation, obliterates all distinction between what is commercial in the Constitutional sense and what is merely incidental to operations which in their consummation cannot be regarded as commercial. Such a rule brings religious, philanthopic, cultural and other organizations, using the mails and interstate communication, within federal regulation, and within the operation of the Act in question.

IV.

At the time of the enactment of the National Labor Relations Act insurance had long been held by this Court not to be commerce within the meaning of the Commerce Clause. Congress did not challenge this construction and specifically include insurance companies within the coverage of the Act. Their regulation, therefore, remains with the States, and they are not within the Act in question.

This Court has held that insurance is not commerce, the making of the contract of insurance is not engaging in commerce, and the policy of insurance is not an instrumentality of commerce.

The "enactment by Congress of legislation which implicitly recognizes the judicial construction" of a Constitutional provision or a former Act of Congress, "is persuasive of legislative recognition that the judicial construction is the correct one" (*Apex Hosiery* case, 310 U. S. 469, 487).

V.

A majority of an appropriate unit of office employees of petitioner did not ask the Union to act as their agent in collective bargaining.

The unit, and the majority for the Union within the unit, as created by the National Labor Relations Board was

the result of illogical and arbitrary action. In its creation the Board contravened its own rule not to include supervisory employees in the same unit with the supervised. It included five supervisory employees who had signed union cards and excluded four who had not. The unit as created consisted of 111 employees, of which 56 is a bare majority. The Board found 60 to have signed union cards. Had the five supervisory employees not have been included there would have been no majority. In other instances employees who had signed union cards were included in the unit, other employees doing similar work, who had not signed, were excluded.

VI.

The employees, Anna Owsiak and Henry Ziolkowski, and the strikers named in Appendix "A" to the decree were not discriminatorily refused reinstatement and were not entitled to back pay.

Anna Owsiak, often late and frequently absent, returning from a stay in hospital, was told there was no work for her at the moment. Leaving the office she met two union officials coming into a conference, and was told to wait in their car outside the building. The officials went in and demanded immediate reinstatement of Anna Owsiak or there would be a strike at once. Their demand was granted, but instead of calling in Anna Owsiak and putting her to work the officials required a phone call to her home to be made by petitioner's officers or agents before 7 P.M. This was not done and a strike was called.

The strike began October 7, 1941 and ended January 27, 1942, with a request for reinstatement. In the meantime there had been a reorganization of positions, an abolition of some and consolidation of others. The net new employment was six persons. An offer was made by petitioner in its pleadings and on the hearing to take back

strikers as places became vacant. This was not satisfactory to the Board. The strike was not immediately caused by petitioner, but arbitrarily by the union officials, and the strikers are not entitled to reinstatement with back pay.

Henry Ziolkowski who asked reinstatement about two days after going out on strike was told he could come back to work but that he should sign an application. This he refused to do, giving as his only reason that he did not feel like a newcomer. The request for his signature was a reasonable one and he is not entitled to back pay from the date petitioner offered to take him back upon receiving his written application. The finding of the Board that this request was made to punish the employee, is not warranted by his own evidence.

VII.

Enforcement of the Board's order should have been denied by the Circuit Court of Appeals, and the complaint as amended should have been dismissed.

Because of the holding of the Circuit Court of Appeals that petitioner in issuing benefit certificates is engaged in the business of insurance it has been necessary to discuss the relation of insurance to interstate commerce and to show that this Court has held that it is not commerce or an instrumentality thereof. Petitioner, however, as a fraternal benefit society is a benevolent and charitable institution by the terms of the Illinois Code and is farther removed from commerce than an insurance company. Its primary aims are cultural and directed toward the independence of Poland. In this it approaches a religious or philanthropic institution, and the issuance of benefit certificates to its members does not make it a commercial institution.

The regulation involved is that of labor relations. Petitioner because of its aims may rightly expect from its employees something more than is expected from the usual commercial employee. It may rightly ask that its employees be zealous for the aims of the organization. In this, too, there is an analogy between it and a church organization. The rule, however, adopted by the Court below, that mere use of the mails in its investment activities, for instance, would bring such an organization within federal regulation under the Act in question, has no reference to the nature or the objects of the organization involved. It works automatically upon showing use of the mails or other means of interstate communication in matters incidental to the collection of funds or the investment side of the organization.

The evidence does not support the findings of violations of the Act by petitioner. The unit and the majority within the unit for bargaining purposes were created by the Board through illogical and arbitrary action, without which there would have been no majority for the Union. Reversal of the judgment of the Circuit Court of Appeals is asked.

PROPOSITIONS OF LAW.

I.

Petitioner is a fraternal benefit society, organized under the laws of the State of Illinos as a not for profit organzation, having a representative form of government and a lodge system with ritualistic form of work. The issuance of benefit certificates to its members is not engaging in the "insurance business" as found by the Circuit Court of Appeals. Petitioner is not in commerce, nor do its activities affect commerce, or a dispute with its employees burden commerce, or the free flow of commerce, so as to bring it within the National Labor Relations Act.

Article XVII Illinois Insurance Code Secs. 894-927 (Ill. R. S. 1941 Ch. 73).

People v. *Commercial Insurance Co.*, 247 Ill. 92, 100.

Vol. 1 Couch Cyc. of Ins. Law (1929 Ed.) p. 609.

National Union v. *Marlow*, 74 Fed. 775, 776.

Peterson v. *Manhattan Life Ins. Co.*, 244 Ill. 329, 337.

Briggs v. *Bankers Acc. Ins. Co.*, 214 Ill. App. 181, 187.

Northwestern Life Ins. Co. v. *Wisconsin*, 247 U. S. 132, 138.

II.

Insurance is not commerce.

Paul v. *Virginia*, 8 Wall. 168.

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250.

Blumenstock v. *Curtis Publishing Co.*, 252 U. S. 436, 442.

N. Y. Life Ins. Co. v. *Cravens*, 178 U. S. 389, 401.

III.

The incidental use of the mails and other means of interstate communication and transportation by petitioner in its operations as a fraternal benefit society is not engaging in interstate commerce. That which in its consummation is not commerce, does not become commerce among the States because incidental transportation takes place.

Hooper v. *California*, 155 U. S. 648, 655.
N. Y. Life Ins. Co. v. *Deer Lodge County*, 231 U. S. 495, 509.
Cooley on Constitutional Law (4th Ed. 1931) pp. 83, 84.

IV.

At the time of the enactment of the National Labor Relations Act insurance had repeatedly been held by this Court not to be commerce within the meaning of the Commerce Clause. Congress did not challenge this construction by specifically including insurance companies within the coverage of the Act. The regulation of insurance companies, therefore, remains with the States, and they are not within the Act in question.

Apex Hosiery Co. v. *Leader*, 310 U. S. 469, 487.
Popovici v. *Agler*, 280 U. S. 379, 383.
Final Report T. N. E. C. p. 41 (Doc. 35, 77th Cong. 1st Sess.).

V.

A majority of an appropriate unit of office employees of petitioner did not ask the Union to act as their agent in collective bargaining.

See Argument under this point.

N. L. R. B. v. *Delaware-New Jersey Ferry*, 128 Fed. (2nd) 130, 137.

In re Western Union, 32 N.L.R.B. 432.

In re Western Union, 34 N.L.R.B. 338.

In re Borden Mills Inc. (1939) 13 N.L.R.B. 459, 455.

In re Seiss Mfg. Co., 8 N.L.R.B. 389, 390.

VI.

The employees Anna Owsiak and Henry Ziolkowski and the twenty-six strikers named in Appendix "A" to the decree were not discriminatorily refused reinstatement and are not entitled to back pay.

See Argument under this point.

Labor Board v. *Columbia Co.*, 306 U. S. 292.

N.L.R.B. v. *Auburn Foundry*, 119 Fed. (2nd) 331, 337.

American Smelting and Refining Co. v. *N.L.R.B.*, 126 Fed. (2nd) 680, 686.

N.L.R.B. v. *Tex-O-Kan*, 122 Fed. (2nd) 433, 438.

Edison Co. v. *Labor Board*, 305 U. S. 197, 229.

N.L.R.B. v. *Ford Motor Co.*, 114 Fed. (2nd) 905.

VII.

Enforcement of the Board's order should have been denied by the Circuit Court of Appeals, and the complaint as amended should have been dismissed.

See Argument under this point.

ARGUMENT.

I.

Petitioner is a fraternal benefit society, organized under the laws of the State of Illinos as a not for profit organzation, having a representative form of government and a lodge system with ritualistic form of work. The issuance of benefit certificates to its members is not engaging in the "insurance business" as found by the Circuit Court of Appeals. Petitioner is not in commerce, nor do its activities affect commerce, or a dispute with its employees burden commerce, or the free flow of commerce, so as to bring it within the National Labor Relations Act.

In Article Seventeen of the Illinois Insurance Code, Sec. 926 (314) (Ill. Rev. Stat. 1941, Ch. 73) it is declared:

> "Every fraternal benefit society organized, licensed or operating under this Code is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal and school tax, other than taxes on real estate and office equipment."

Petitioner was chartered by the State of Illinois as a not for profit corporation without capital stock, and is operating under the provisions of said Article Seventeen. It is carried on for the sole benefit of the beneficiaries and its members and not for profit. It has a lodge system with ritualistic form of work and a representative form of government, and is organized into 1817 lodges which meet at least once a month. Its supreme legislative and governing body is the Convention which meets at least once

each four years. Delegates to the Convention are selected from groups of lodges which form Councils. It has a number of elective officers, and its elected Board of Directors is its executive body.

The Court of Appeals found that notwithstanding petitioner is incorporated as a fraternal association it is "engaged in the insurance business" in a fashion similar to mutual life insurancee companies.

This holding runs counter to a number of decisions in Illinois and in other States, and to the policy of the State of Illinois, which declares such associations to be charitable and benevolent organizations (Art. XVII Ill. Ins. Code, Sec. 926 (314) R. S. Ill. 1941 Ch. 73). In Vol. 1 Couch Cyc. of Ins. Law (1929 Ed.) page 609, it is said:

> "The statutory distinction is that insurance companies are organized for ordinary business purposes, for investment and for the benefit of credit, as well as for the protection of the family, whereas fraternal Orders and benefit societies are not organized for the purpose of profit . . . Certificates in mutual benefit societies do not constitute insurance within the meaning of the provisions against other, over or double insurance."

In *People* v. *Commercial Ins. Co.*, 247 Ill. 92, 100, the Supreme Court of Illinois declares:

> "That there is a fundamental difference between life insurance companies on the one hand, and those organizations commonly known as fraternal associations, fraternal beneficiary societies or mutual benefit societies on the other hand, requiring separate codes for the management and regulation of each, has been recognized by the Legislature of this State and by this court ever since such associations or societies came into general use as a means of furnishing aid to members and to families of deceased members . . .

This distinction has been consistently maintained by the legislature ever since, by declaring that such associations or societies shall not be deemed insurance companies, by expressly exempting them from the Acts passed to regulate life insurance companies and by enacting separate codes for their organization and control . . .

Life insurance companies are organized to engage in the business of insuring the lives of persons for profit. The primary object of fraternal associations is to obtain social intercourse among the members and to furnish relief and assistance to members and persons dependent upon them not upon a commercial or business basis, but upon the broad principle of friendship and brotherly love. The insurance feature is but an incident to the main purpose of organization. It is united to the payment of benefits to members and to persons dependent upon them and is conducted not for the purpose of gain or profit to the association, but to further the benevolent purposes of its organization."

In *National Union* v. *Marlow*, 74 Fed. 775, 778, the Court say:

"The term 'fraternal' can properly be applied to such an association for the reason that the pursuit of a common object, calling or profession usually has a tendency to create a brotherly feeling among those who are thus engaged. It (the Legislature) has declared in effect, or intended to so declare, that when a certain number of persons, among whom some natural bond of sympathy or interest existed, should form an association for self improvement, or for the purpose of aiding one another and strengthening the bond of union, such association might be consolidated into a corporation, and incidentally, to further the

ends of its creation, might provide for the relief of members and their families in case of sickness or death by levying assessments and issuing benefit certificates . . . this right, however, is merely incidental to the main purpose of its creation."

The Preamble to petitioner's Constitution declares that the purposes of the Polish National Alliance are to "form a more perfect union of the Polish people in this country; insuring to them a proper moral, intellectual, economic and social development; preserving the mother tongue as well as the national culture and customs and promoting more effectually all movements tending to secure by all legitimate means the restoration and preservation of the independence of the Polish territories in Europe."

These are not commercial aims. The issuance of benefit certificates is but incidental to membership in an organization whose main purposes are cultural and also directed toward regaining by all lawful means the independence of the Polish territories in Europe.

It is the long established policy of the State to encourage thrift among the membership of these organizations, whose principal purposes are religious and cultural and fraternal, and to this end to permit the issuance of benefit certificates, yet to permit no profit to be made by such associations. For their encouragement, it exempts them, as charitable and benevolent organizations, from the usual incidence of taxation (Art. XVII Ill. Ins. Code, Sec. 926 (314). R. S. of Ill. 1941, Ch. 73).

The question of their difference from insurance companies is not one of logic: it is a question of public policy. To say that a fraternal benefit certificate is an insurance policy by another name, is to miss the distinction clearly made by statute between an organization whose principal purposes are religious or cultural or fraternal, or all

three, and which is permitted for the benefit of its membership and their dependents to issue benefit certificates as a financial protection against the losses that come in the train of sickness and death; and an organization whose sole purpose is the sale of insurance at a profit.

Without profit as an aim there is no commerce in the Constitutional sense. This is recognized in the case of *Associated Press* v. *N.L.R.B.*, 301 U. S. 103, 125 which the Court of Appeals found to be controlling in the present case. The Associated Press, this Court declared "is an instrumentality set up by constituent members who are engaged in a commercial business for profit."

Petitioner is not engaged in a commercial business for profit nor are its constituent lodges, its councils, its Convention, its officers or its directors so engaged in their official capacity. It is principally engaged in promoting fraternalism among its members and in keeping alive among its thousands of members the culture and language of Poland; and most particularly at this time, in striving by all lawful means for the liberation of Poland. These aims are expressed in manifold activities which cannot be measured, as it would seem the Court of Appeals measured them, by taking the total income of the Polish National Alliance, (which must be invested and expended in accordance with the laws of Illinois and the constitution and bylaws of the Alliance,) and comparing this income with the very substantial sum spent on cultural and charitable objects, which, though substantial, was but five per cent of the income; and drawing the conclusion, which the Court did, that the cultural, fraternal and benevolent purposes of the Alliance are but incidental to its activities surrounding the issuance of benefit certificates.

Nor is it a question of more or less—of more certificates issued and less cultural activity. It is a question of the

inherent difference between a commercial and a non-profit organization; between trade and fraternalism; between commerce and culture—a distinction well recognized in the law, which places the profit organizations on one side and the non-profit organizations, despite a similarity of activities in one phase of their operations, on the other.

As said by the Supreme Court of Illinois in *Peterson* v. *Manhattan Life Ins. Co.*, 244 Ill. 329, 337:

> "In the ordinary sense a fraternal order is not an insurance company. * * * The two classes of corporations are organized under different acts and for different purposes.
>
> The insurance company is an ordinary business corporation, and its policies are obtained for ordinary business purposes, for investments, for security, for the benefit of credit, as well as for the protection of the family.
>
> The beneficiary society is organized not for the purposes of profit."

The distinction has been noted and declared in this Court also.

In *Northwestern Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 138, where it was contended that because a State law exempted fraternal beneficiary associations from the questioned tax, it was a discriminatory law. The Court held not, saying: "We think the differences (between an insurance company and a fraternal benefit society) are plain. The fraternal and beneficial features are wanting in organizations like that of Northwestern Company."

II.

Insurance is not commerce.

The Circuit Court of Appeals declared that although "a long line of Supreme Court decisions" have held that "insurance is not commerce" or "at any rate have held that the issuing of a policy of insurance is not a transaction in commerce," these cases, *Paul* v. *Virginia*, 75 U. S. 168; *Hooper* v. *California*, 155 U. S. 648; *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389; *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495,—are not decisive, for the reason, as the Court says, that "in each of them the court was considering the power of the State to tax or regulate, and not the power of Congress under the Commerce Clause."

The language of these cases is not thus limited, so as to be inapplicable to the case at bar. The Court, in them, discusses the nature of the insurance contract itself, as to whether or not it is an article of commerce, and decides that it is not.

In *Paul* v. *Virginia*, 8 Wall. 168, the Court say:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts. * * * These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale. * * * Such contracts are not interstate transactions, though the parties may be domiciled in different States.

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, the Court say:

> "That the mere formation of a contract between persons in different States is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question." (Citing *Paul* v. *Virginia* and other cases.)

In *Hooper* v. *California*, 155 U. S. 648, 655, it is declared:

> "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse."

In *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 401, the Court say:

> "We will only repeat: The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse."

In *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, it is said:

> "The decision of the cases is that the contracts of insurance are not commerce at all, neither state nor interstate."

These are general statements about the nature of the contract of insurance. They do not concern alone, and are not limited to the contract of insurance, viewed as a subject of State taxation, or of State regulation. They are made with reference to insurance as a subject of interstate commerce, and they declare that an insurance

contract is not a commodity in the generally accepted meaning of the term. It is not relevant to this point, therefore, to proceed, as does the Court of Appeals, to discuss the limits of State and Federal power with reference to a possible regulation of insurance or insurance companies, and to say that this Court, in the case of *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311, has held that it does not follow because a thing is the subject of state taxation it is also immune from federal regulation under the Commerce Clause. The question, at this point, is not the boundaries of federal and state regulation, but the essential nature of the contract of insurance, viewed as to its possibility or otherwise of becoming the subject of interstate commerce.

The Court of Appeals in this connection also relies heavily upon *Wickard* v. *Filburn*, 317 U. S. 111, where the question involved is the constitutional power to regulate production of an undoubted commodity,—farm produce,—which might become the subject of interstate commerce, and in any event could exert "a substantial economic effect on interstate commerce" either directly or indirectly. The question there was not, as it is here, whether the regulated subject could be the subject of interstate commerce.

III.

The incidental use of the mails and other means of interstate communication and transportation by petitioner in its operations as a fraternal benefit society is not engaging in interstate commerce. That which in its consummation is not commerce, does not become commerce among the States because incidental transportation takes place.

Although insurance is not commerce, yet, because petitioner uses the mails and other means of interstate com-

munication in connection with its issuance of benefit certificates to its members, the Court of Appeals held it to be within the provisions of the National Labor Relations Act, as having, by this use, "affected commerce." A labor dispute between petitioner and its employees was, therefore, held to burden or obstruct commerce or the free flow of commerce.

The Court relied upon *Associated Press* v. *N.L.R.B.*, 301 U. S. 103 which, however, can be distinguished from the case at bar by the fact that the operations of the members of Associated Press were clearly within the established conception of commerce between the States. This Court, in that case, (p. 128) say:

> "The Associated Press is engaged in interstate commerce within the definition of the statute and the meaning of Article 1, Section 8 of the Constitution. It is an instrumentality set up by constituent members who are engaged in a commercial business for profit."
>
> "It has," says the Court, "about 1350 members in the United States, and practically all the newspapers represented in its membership are conducted for profit."

The Court of Appeals ignored the fact that in all its operations, cultural, fraternal, and those surrounding the issuance of benefit certificates, petitioner is a non profit organization, and does not and cannot under its charter and the laws of the State of its creation make a profit by any of its activities. The Court, also, refused to be bound in this case by the "long line of decisions" of this Court that insurance is not commerce. It based its decision that petitioner was within the purview of the National Labor Relations Act upon the use by petitioner of the mails

and other means of interstate communication. The Court said:

> "It is beyond question that a large portion of petitioner's activities were of a business nature and carried on by interstate communication. Applying the pronouncement in the *Associated Press* case, such business is interstate commerce within the power of Congress to regulate."

The Court then proceeds to hold that even if "petitioner's contention that it is not directly engaged in interstate commerce be tenable, it would still be faced with an insurmountable barrier," in that its "far flung activities" affect commerce within the meaning of the Act, and a labor dispute within its organization burdens or obstructs commerce or the free flow of commerce.

"That" says Cooley on Constitutional Law (4th Ed. 1931, p. 84) "which in its consummation is not commerce, does not become commerce among the States because incidental transportation takes place."

In *Hooper* v. *California*, 155 U. S. 645, 655, the Court say:

> "If the power to regulate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude State control over many contracts purely domestic in their nature.
>
> The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse."

In *New York Life Ins.* v. *Deer Lodge County*, 231 U. S. 495, 509, it is declared:

> "The number of transactions do not give the business any other character than magnitude. Nor, again, does the use of the mails determine anything. That (agents, and applicants for insurance) may live in different States and hence use the mails for their communication does not give character to what they do; and cannot make a personal contract the transportation of commodities from one State to another.
>
> The decision of the cases is that the contracts of insurance are not commerce at all, neither state nor interstate."

In this case the Court say (on page 507):

> "It was also urged that modern life insurance had taken on essentially a national and international character, and that when *Paul* v. *Virginia* was decided, the business was to a great extent local, that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing development which has made them the greatest associations of administrative trusts in the business world.
>
> These contentions were earnestly made; the reply to them deliberately meditated and its extent fully appreciated. The ruling in *Paul* v. *Virginia* and other cases applied. . . . We . . . repeated that the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce" (p. 508).

The rule laid down by the Circuit Court of Appeals in the case at bar, that mere use of the mails and other means of interstate communication is alone and of itself sufficient to bring any organization, whether conducted for profit or not, within federal regulation, obliterates all dis-

tinction between what is commercial in the true sense, and what is merely incidental to operations which in their consummation cannot be regarded as commercial in any sense. Such a rule might logically be applied in any case where use of the mails is shown, no matter for what purpose they were used—religious, cultural, philanthropic, or any other. Once use of the mails was shown, courts would have to inquire no further as to the nature or purpose of the communications. Federal regulation would be automatically applied. This is not the law.

IV.

At the time of the enactment of the National Labor Relations Act insurance had repeatedly been held by this Court not to be commerce within the meaning of the Commerce Clause. Congress did not challenge this construction by specifically including insurance companies within the coverage of the Act. The regulation of insurance companies, therefore, remains with the States, and they are not within the Act in question.

Even if it could be held, as determined by the Circuit Court of Appeals, that for the purpose of regulation by Congress fraternal benefit societies and insurance companies, which use the mails and other means of interstate communication, are engaged in commerce; and their activities in this regard affect commerce; and labor disputes between them and their employees burden or obstruct commerce or the free flow of commerce; yet, Congress has not chosen to exercise such a power of regulation by its enactment of the National Labor Relations Act.

The terms "commerce", "affecting commerce", "burdening commerce and the free flow of commerce" must be construed in the light of the historical fact, assumed to be known to Congress, that insurance by a long line of deci-

sions of the Supreme Court is held not to be commerce, and the making of the contract of insurance is not engaging in interstate commerce, and the contract itself is not an instrumentality of commerce. In the absence of an expressed intent to include insurance as a subject of the regulatory provisions of the Act, it must, therefore, be considered that insurance is not within its coverage.

In *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 487, the Court say:

> "A point strongly urged in behalf of respondents in brief and argument before us is that Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. To this the short answer must be made that for the thirty-two years which have elapsed since the decision of *Loewe* v. *Lawlor,* 208 U. S. 274, this Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act, 'Every contract, combination . . . or conspiracy in restraint of trade or commerce' do embrace to some extent and in some circumstances labor unions and their activities; and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operation of the Act. On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it.
>
> Whether labor organizations and their activities are wholly excluded from the Sherman Act is a question of statutory construction, not constitutional power. The long time failure of Congress to alter the Act after it had been judicially construed, and the enact-

ment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one."

In *Popovici* v. *Agler*, 280 U. S. 379, 383, which arose upon an application by a vice-consul for a writ of prohibition to restrain a divorce proceeding in a State Court, the petitioner relied on Article 3 Section 2 of the Constitution, which provides among other things, that jurisdiction of:

> "Suits and proceedings against Ambassadors or other public ministers or their domestics, or domestic servants, or against consuls or vice-consuls,"

shall be in the United States Courts, exclusive of the Courts of the several states. This Court, speaking through Mr. Justice Holmes, said (p. 383):

> "The language so far as it affects the present case is pretty sweeping, but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used. It has been understood that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States,' and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied."
>
> "The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. The statutes . . . do not affect the present case if it be true, as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common under-

standing was that the domestic relations of husband and wife, parent and child, were matters reserved to the States, there is no difficulty in construing the instrument accordingly, and not much in dealing with the statutes. Suits against consuls and vice-consuls, must be taken to refer to ordinary civil proceedings and not to include what formerly have belonged to the ecclesiastical Courts."

Congress not having specifically included insurance companies, their regulation, therefore, remains with the States, and they are not within the Act in question.

In *N. Y. Life Ins.* v. *Deer Lodge County*, 231 U. S. 495, 509, the Court say:

"If insurance is commerce and becomes interstate commerce whenever it is between citizens of different States, then all control over it is taken from the States, and the (State) legislative regulations which this Court has heretofore sustained must be declared invalid."

In the *Final Report of the Congressional Temporary National Economic Committee*, upon legal reserve life insurance, the recommendations of the Committee are prefaced by these words (p. 41):

"Life insurance business is regulated by the States."

The Report then proceeds:

"Our studies have disclosed conditions which lead to the following recommendations *which are respectfully made for the consideration of the several States in which these companies are domiciled*" (T.N.E.C. Report p. 41, 77th Cong. 1st. Sess. Doc. 35). (Italics supplied.)

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, the Court say:

> "That the mere formation of a contract between persons in different States is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question." (Citing *Paul* v. *Virginia* and other cases.)

Congress had it chosen to challenge the doctrine that insurance is not commerce, might have been expected, in view of the well known and often declared position of the Supreme Court in this regard, to have explicitly included insurance companies within the sweep of the National Labor Relations Act. This it did not do, and the silence of Congress must be considered as an exclusion of such organizations from the operation of the Act.

V.

A majority of an appropriate unit of office employees of petitioner did not ask the Union to act as their agent in collective bargaining.

The Circuit Court of Appeals, in discussing this question, say that the "record indicates that there may be merit to petitioner's assertion" that the Board included certain employees who had signed union cards and excluded others with similar duties who had not.

Out of the 138 employees of the Chicago office, the Board found a group of 111 employees to be the appropriate bargaining unit. Of this unit it found sixty had designated the Union as their agent for bargaining. A bare majority would be 56. The inclusion by the Board of

ive chief clerks, contrary to its own rule that supervisory employees should not be included in the same unit with he supervised, was sufficient to give the majority to the Union. All five had signed union cards: without them the Union would not have had a majority in the unit.

The action of the Board in this respect was arbitrary. In other respects, also, the unit created by the Board, and the majority which it carved out of the unit, were arbitrary and illogical and in contravention of the Board's own rules.

Not only did the Board include within the unit the five chief clerks, who had signed union cards, and whose duties and whose salaries were clearly those of supervisory employees (App. 412-416; 545; 220-223); it excluded four similar supervisory employees who had not designated the union as a bargaining agent (App. 546, 547). The assistant to the Comptroller, who in the absence of the Comptroller was in charge of the Department, had signed a union card and was included by the Board in the unit and the majority; the assistant to the General Secretary who had not signed such a card, was excluded. Two editors who signed union cards were included in the unit; two librarians who had not signed, were not. The confidential secretary to the Chief Medical Examiner who had signed a card, was included; the confidential secretary to the General Secretary, who had not signed, was excluded (App. 545 *et seq.*). It is apparent that the basis of inclusion or exclusion in almost identical cases was the signing or otherwise of the union card. In no other way could a majority have been achieved for the Union.

In *N.L.R.B.* v. *Delaware and New Jersey Ferry Co.*, 128 Fed. (2nd.) 130, 137, it is declared:

"The inclusion of supervisory employees in a bargaining unit of any kind is unusual. The courts al-

most invariably have held the employer responsible for acts which constitute unfair labor practice when committed by supervisory employees of no higher grade than foreman or assistant foreman."

That the five supervisory employees included in the unit were clearly such is shown by the record. Ziolkowski (App. 220) was in charge of the Mortuary Department with two or three employees subordinate to him. His salary was $235.00 per month. The next highest salary in his department was $145.00 (App. 220, 414).

Pawlowski was in charge of the Statistical Department, with four or five subordinates. His salary was $180.00 per month: the next highest salary in his department was $115.00 (App. 220, 414).

Andrzejewski was head clerk in the Underwriting Department with two subordinates. His salary was $185.00 per month: the next highest was $115.00 (App. 414).

Neuman is assistant to the Comptroller, who takes charge when the Comptroller is absent. His salary was $175.00 per month: the next highest was $135.00 (App. 221, 416).

Hawrylewicz was in charge of the Youth Department with three or four subordinates. His pay was $200.00 per month: the next highest in his department was $110.00 per month.

The Board in a number of decisions has laid down the rule that supervisory employees should not be included in a bargaining unit, and has discussed the elements which put an employee in the supervisory class.

In *Borden Mills Inc.* (1939) 13 N. L. R. B. Reports 459, 465, the Board say: "The power to employ or discharge is not the sole criterion by which we determine whether an employee speaks with the voice of his employer. Once

an employee is vested with the authority to give orders, he becomes a part of the supervisory and managerial system, even if the orders he gives are not initiated by him.

In *Seiss Mfg. Co.* (1935) 8 N. L. R. B. 389, 390 the Board say that employees are classed as supervisory who spend a considerable amount of time in assigning work, and report directly to the general foreman, although partly engaged in production operations and without authority to hire or fire.

In *Western Union* cases (1941) 32 N. L. R. B. 432; 35 N. L. R. B. 273; 34 N. L. R. B. 338, it is declared that employees who supervise the work of employees under them, assign and distribute work, report infractions of regulations and earn more wages than persons who work under them are to be excluded from the unit as supervisory employees. In 34 N. L. R. B. 338 it appears that the supervisory employees earned from $15.00 to $20.00 per month more than those they supervised.

VI.

The employees Anna Owsiak and Henry Ziolkowski and the twenty-six strikers named in Appendix "A" to the decree were not discriminatorily refused reinstatement and are not entitled to back pay.

In the case of Anna Owsiak, who was found by the Board to have been discriminatorily discharged, the Court of Appeals say that a "reading of the testimony raises some doubt as to the propriety of the Board's finding, but we cannot hold it is without substantial support." This employee was frequently late and often absent, and finally was obliged to undergo an operation from which she returned to find that there was no work for her. As she was leaving the office of petitioner, she met two of the

union officials going in for a conference with the officers of petitioner. She told her story and was directed to wait in the officials' automobile then parked at the door. This she did, while the officials were in conference, at which conference they demanded her immediate reinstatement under threat of a strike. Their demand was at once complied with, in order to avoid a strike. Instead of telling the officers that the employee was waiting outside, the officials demanded that they telephone her home before seven o'clock. For some reason this was not done, and the strike was immediately called (App. 66, 67, 71, 136). There had been coupled with the demand for this employee's reinstatment a demand for the retransfer of an employee named Lahaczyk to her old position. This demand was refused. The Board did not find her transfer discriminatory and did not require a retransfer.

In view of the threat made at the conference it must be assumed that these two incidents were made the immediate cause of the strike. It should not have occurred. Immediate compliance with one demand had been granted, and the other demand was obviously an improper one, affecting internal discipline, which could not be granted. The responsibility for the strike, therefore, is upon the strikers and the union officials. The strike was hastily called, ineffective as a demonstration and unsuccessful as a weapon. It began October 7, 1941, and ended January 27, 1942 with a request for reinstatement (App. 65, 67, 68, 72, 423, 4, 5).

Before the request for reinstatement petitioner had reorganized its office positions and made a number of transfers from the Real Estate department, which by reason of lack of business had become overstaffed. It had abolished certain positions and consolidated others. During the entire period of the strike the net addition of new employees was six. On the hearing an offer was made

by the General Secretary to rehire strikers as positions became available (App. 289). The same offer had been made in the pleadings (App. 324). The Board ordered reinstatement of the strikers and that they be made whole for any loss of pay suffered by the refusal to reinstate them (App. 568).

The Board found that the employe Ziolkowski, who requested reinstatement within two or three days after he had gone on strike, and whose request was granted, but who refused to sign an application for employment, because, as he said, he did not feel like a newcomer, was entitled to reinstatement as of the date of all the striker's request for reinstatement and to back pay from that date. (The Court modified this to grant back pay from the date of his request for reinstatement.) The Board held that the request made to this employe to sign an application for employment on his return to work was an unfavorable condition imposed as a punishment, and that he was justified in refusing to sign (App. 115, 116, 563). He testified on cross examination that no seniority rights were involved and that the only thing he had in mind was that he did not feel like a newcomer. The request was not unreasonable as the written application might well have been required as a matter of record. The Board was not warranted in its inference that the intent was to punish the employe, and its finding of such intent is not based upon substantial evidence.

VII.

Enforcement of the Board's order should have been denied by the Circuit Court of Appeals, and the complaint as amended should have been dismissed.

Because of the holding by the Circuit Court of Appeals that petitioner as a fraternal benefit society is engaged in

the business of insurance, it has been necessary to discuss the relationship of petitioner to interstate commerce as though it were an insurance company. Yet, even upon that assumption, it is not engaged in commerce, nor do its activities in the issuance of benefit certificates affect commerce; and a labor dispute within its organization does not burden commerce or the free flow of commerce.

Petitioner, however, is farther removed from commerce than an insurance company. It is a non profit organization, declared, for the purpose of taxation and regulation by the State of its creation to be a charitable and benevolent institution. Its primary aims are cultural and are also directed toward the restoration of the independence of Poland, and the fostering of unity and fraternalism among persons of Polish descent in the United States. These aims are not commercial. The issuance of benefit certificates to its members is not a commercial transaction, for no profit is permitted to be made therefrom; and, despite the number of certificates and the amount of funds involved, this activity is but an incident to membership in the organization.

To bring such an organization within federal regulation because of its use of the mails and other means of interstate communication is to adopt a rule of decision that works automatically, and without reference to the nature of the organization involved or the primary purposes of its creation. The rule would apply equally to religious and purely philantropic organizations which use the mails and other means of interstate communication.

The regulation involved in this case is that of the labor relations of petitioner. In an organization, devoted as is the Polish National Alliance to the purposes of keeping alive the Polish language and culture, and securing and maintaining the independence of Poland by all lawful means, it will be obvious that employment in its Home

Office and throughout its organization may depend on other factors than those usually sought in an industrial or commercial employee. Enthusiasm for Polish culture and for the freedom of Poland, faith in the future of Poland and its culture, and willingness to work for the independence of Poland by all lawful means might well be sought by petitioner in its employees, and rightfully required as a condition of employment. In these respects it is similar to a religious body. The issuance of benefit certificates to its members does not make such an organization an insurance company or bring its operations within the regulation of Congress under the Act in question.

The evidence of the cause of the strike, its prolongation, and the refusal to reinstate certain employees, does not support the findings of the Board that in these particulars petitioner violated the National Labor Relations Act. The unit created by the Board for collective bargaining clearly was the creature of illogical and arbitrary action by the Board, without which there could have been no majority for the Union.

The judgment of the Circuit Court of Appeals should be set aside, the enforcement decree vacated, and the complaint, as amended, dismissed.

Respectfully submitted,

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